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No. 95-1376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether former employees are included under the term "employees" in Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) which prohibits an employer from discriminating against any of its "employees or applicants for employment" because they have availed themselves of Title VII's protections.

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas of the law, WLF devotes a substantial portion of its resources to cases raising civil rights issues. In that regard, WLF has appeared as amicus curiae in numerous civil rights cases before this Court. *See, e.g.*,

City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

WLF also has an interest in ensuring that courts do not exceed their judicial powers by usurping the role of the legislative branch in interpreting statutory language. Accordingly, WLF submits that the court of appeals below was correct in interpreting the term "employees" in Section 704(a) of Title VII to mean only those persons who are currently employed at the time the alleged discriminatory act took place. Any enlargement of that term so as to encompass former employees as suggested by Petitioner and his amici should be made legislatively rather than judicially.[1]

STATEMENT OF THE CASE

Petitioner's employment with Shell Oil Company was terminated on October 13, 1991, under a severance program. He filed a racial discrimination complaint against the company with the Equal Employment Opportunity Commission (EEOC).[2] While that charge was pending, the

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[1] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of this Court.

[2] Petitioner subsequently filed suit in 1993 on the discharge claim in district court. Following a trial in which there was no evidence of discrimination, the court entered a judgment for Shell.

petitioner applied for a job with Metropolitan Life Insurance Company.

When Metropolitan requested that Shell complete a routine questionnaire regarding the Petitioner's past performance, Shell gave below average ratings, indicated that Robinson's termination was not voluntary, and that Shell would not rehire him. Petitioner then filed a second discrimination complaint alleging that Shell violated Section 704(a) by providing negative performance ratings because he had filed a discriminatory discharge complaint.

Petitioner subsequently filed suit on the retaliation claim. The district court dismissed the case, relying on the Fourth Circuit's decision in *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala*, 507 U.S. 1048 (1993), and held that Section 704(a) applies only to current employees or applicants for employment, not former employees. The court of appeals on rehearing *en banc*, affirmed the district court, holding that the plain meaning of the term "employees" does not extend to former employees. *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995).

SUMMARY OF ARGUMENT

Applying basic rules of statutory construction, the court of appeals correctly ruled that the term "employees" in Section 704(a) does not include former employees. Both the plain meaning of the term, as well as the context in which it is used in Section 704(a), clearly demonstrate that former employees are not included within its coverage.

Extending the term "employees" to include former employees would not only be contrary to rules of statutory

construction, but also would have adverse policy consequences by extending employer liability indefinitely with respect to former employees; causing confusion among employers as to when one employer's potential liability ends and another employer's liability begins; bypassing more appropriate remedies under state tort and contract law regarding employer liability for negative performance evaluations; and undermining the integrity of good employment recommendations.

ARGUMENT

I. INTERPRETING SECTION 704(a) OF TITLE VII TO INCLUDE "FORMER EMPLOYEES" VIOLATES THE PLAIN MEANING OF THE ANTI-RETALIATION PROVISION AND OTHER RULES OF STATUTORY CONSTRUCTION.

The task of resolving a dispute over the meaning of a statute begins with the language of the statute itself. *United States v. Ron Par Enters., Inc.*, 489 U.S. 235, 241 (1949). When the language of the statute is "unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances'." *Garcia v. United States*, 469 U.S. 70, 75 (1984) (citation omitted). In ascertaining the plain meaning of a statute, courts look to the particular statutory language at issue, as well as the design of the statute as a whole. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). No deference is due to interpretations at odds with the plain language of the statute. *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989). Even longstanding agency interpretations must fall to the extent they conflict with statutory language. *Id.*

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). To hold that "former employees" are covered under Section 704(a) violates the plain language of Section 704(a). "Employee" is defined in Title VII as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Formerly employed individuals are simply not "employed by an employer."

While amicus submits that this should be the end of the inquiry, the context in which the term "employee" is used in Section 704(a) further underscores the correctness of the lower court's conclusion. Section 704(a) specifically distinguishes between "employees" and "applicants for employment," while omitting any reference to "former employees." *Id.* With "applicants for employment" made distinct from "employees" in Section 704(a), Congress evidenced its intent that the definition of "employee" be limited in scope. The boundaries of the term "employee" are thus clearly established by the context in which it appears in this anti-retaliation provision.

There are three basic arguments Petitioner and his amici make to extend the term "employee" in Section 704(a) to include former employees. The first argument is

that the common use of the term "employee" as it is used in other statutes has been interpreted by courts to refer to present, future, and past employment. Pet. Br. at 8, 17-20; EEOC Br. at 12, 15. The second claim is that the term "employee" as used in other provisions of Title VII has been interpreted to include former employees, and therefore, the same interpretation should apply in this instance. Pet. Br. at 13-17; EEOC Br. at 10, 12, 14. The third argument is that the text and purpose of Title VII and the anti-retaliation provision require an extension of "employees" in Section 704(a) to include former employees; excluding coverage to former employees would allegedly sanction or encourage employer intimidation. Pet. Br. at 20-36; EEOC Br. at 16-21. All three of these arguments are without merit.

A. In Section 704(a), the Term "Employee" Is Not Ambiguous Because Its Meaning and Scope Is Determined By Its Definition and the Context In Which It Appears In the Provision.

In the anti-retaliatory provision, the term "employee" is not ambiguous because the definition of the term in Title VII is clear and its scope is defined by the context in which it appears in the provision. "Ambiguity" is defined as "uncertainty of meaning of an expression used in a written instrument." *Black's Law Dictionary* 73 (5th ed. 1979).

We agree with Petitioner that the term "employee" may in certain circumstances be unclear or ambiguous. The fact that the term "employee" is ambiguous as used in some other contexts or other laws, however, does not necessarily mean that the term "employee" is always ambiguous.

"Employee" in Section 704(a) is one of those cases where the term's definition, in light of its context within the provision, provides clarity as to its meaning. The fundamental principle of statutory construction is that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993); *see K-Mart Corp.*, 486 U.S. at 291 ("in ascertaining the plain meaning of a statute, courts look to the particular statutory language at issue, as well as the language and design of the statute as a whole"). Indeed, statutory language must always be read in its proper context. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).

First, the term "employee" as defined in Title VII "*means* an individual employed by an employer." 42 U.S.C. § 2000e(f) (emphasis added). This subsection does not define "employee" by using the open-ended word "includes" as do some other definitions in this section. *See, e.g.*, 42 U.S.C. §§ 2000e(a) ("'person' includes. . ."); (j) ("'religion' includes. . . "). Thus, a former employee cannot be said to be an "individual employed by an employer."

Furthermore, the term "applicants for employment" used in conjunction with "employee" in Section 704(a) dispels any ambiguity the term "employee" may have within the provision. Congress's insertion of "applicants" in the provision signified that "employee" in Section 704(a) did not extend to applicants for employment. Otherwise, Congress would not have felt it necessary to include the term "applicants for employment" in the provision. Following the fundamental principles of statutory construction, the term "employees" in Section 704(a), by excluding applicants from its definition, requires an

exclusion of former employees with respect to the same provision.

Petitioner cites a few cases where the term "employee" was used in other statutes to refer to former employees. Pet. Br. at 4, citing *Betts*, *supra*, (pensioners); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967) (unemployed individuals); *Fleming v. Nester*, 363 U.S. 603 (1960) (retired workers). In those cases, however, the definition of "employees" was determined from the term's context within the particular statute.

In the case at bar, "employees" is also defined from its context in Section 704(a). Unlike those cases where the term "employees" was interpreted broadly, however, the context of the term "employees" in Section 704(a) requires a narrow application of the term. Indeed, with "applicants for employment" distinct from "employees," it is inconsistent with the fundamental rules of statutory construction to interpret "employees" broadly so as to include former employees.

Even Petitioner's amicus EEOC is forced to concede that "not . . . every statutory reference to 'employees' includes all former employees; context may require a more limited construction." EEOC Br. at 13, citing *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) ("the ordinary meaning of 'employee' does not include retired workers"). In the case at bar, the context of "employees" as used in Section 704(a) requires a more limited construction.

Thus, the term "employee" is not ambiguous because the insertion of "applicants" in the same provision evidences Congress' intent not to include former employees

within the coverage of Section 704(a). As the court of appeals below correctly observed, "Congress' inclusion of 'applicants for employment' as persons distinct from 'employees,' coupled with its failure to likewise include 'former employees,' is strong evidence of Congressional intent that the term 'employees' in [Section 704(a)] does not include former employees." *Robinson v. Shell Oil Co.*, 70 F.3d at 330.

Indeed, the legislative history of Title VII further confirms that Congress intended "employee" as used in Section 704(a) to be narrowly construed. During the drafting stages of Title VII, Congress considered using the term "persons" in place of "employees." H.R. Rep. No. 1370, 87th Cong., 2d Sess., at 11 (1962). "Persons" are obviously a larger group than "employees." However, the provision as enacted contains the more limiting term "employees." If Congress wanted to cover former employees under this provision, it could have easily used the term "persons" in the statute. Congress chose not do so. Therefore, "employee" in Section 704(a) has a more limiting construction than Petitioner contends.

B. Interpreting "Employee" Broadly in Other Sections of Title VII Does Not Mean It Should Be So Interpreted in Section 704(a).

Petitioner additionally cites to a number of Title VII provisions where the term "employee" must be construed to include former employees as well as current employees, and argues that the term should similarly be construed in Section 704(a). Petitioner's argument falls far short of the mark. Those provisions, unlike the one *sub judice*, could be said to fall within one of the exceptions to the plain

meaning doctrine, namely, whether a literal meaning of the term "employee" would lead to grossly absurd results or would be at odds with the demonstrable and "clearly expressed" intention of the legislative body. *See United States v. Ron Pair Enters., Inc.* 489 U.S. at 242; *Russello v. United States*, 464 U.S. 16, 20 (1983).

Thus, Petitioner notes that the term "employee" is used in nine instances in Title VII where the term "clearly encompass former employees." Pet. Br. at 14. For example, Section 717(b)(3) provides that the EEOC is to give notice of its final agency action to "an employee or applicant for employment," even to those who were unlawfully terminated, and thus, formerly employed. Similarly, Sections 706(g)(1) and 717(b), authorizing "reinstatement. . . of employees" as remedies, would not make sense if former employees were not included because the term "reinstatement" presupposes that the victim of discrimination was terminated from employment. Amicus agrees that it would be an absurd reading of the term "employee" to exclude terminated employees from the right to receive the EEOC notice or to obtain reinstatement.

Furthermore, it should be noted that the provisions cited by Petitioner are generally concerned with the procedural rights and remedies that accrue as a result of discrimination that occurred while the (former) employee was actually employed. In this case, however, the allegedly prohibited act occurred after the employment relationship ended. In addition, Section 704(a)'s prohibition of retaliation is not a procedural right or remedy; rather, employers have a substantive duty not to discriminate against their employees or applicants for employment because of their participation in Title VII

proceedings, whether as a claimant or witness.[3] It does not lead to absurd results to exclude former employees from that coverage; consequently, there is no justification to expand the plain meaning of the term "employee" as one who is currently employed by an employer to include former employees.

Petitioner's arguments, similar to those of the dissenting opinion below as to why the term should be extended in scope, is not one of definitional absurdity, but one of perceived unfairness. Those policy arguments, however, are best left for the legislative branch rather than the judicial forum; otherwise the courts would be legislating on a case-by-case basis. [4]

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[3] The fact that employers may be subject to punitive damages for discriminatory conduct under 42 U.S.C. § 1981a is yet another reason why "employee" should be interpreted narrowly. The rule of narrow construction, similar to the rule of lenity, requires statutory provisions imposing penalties to be strictly construed. *Commissioner v. Acker*, 361 U.S. 87 (1959); *Gold Kist, Inc. v. U.S. Dep't of Agriculture*, 741 F.2d 344, 347-49 (11th Cir. 1984). Punitive damages are by definition penal rather than compensatory in nature.

[4] Our laws, including civil rights laws, are replete with line-drawing policy decisions, such as the number of employees required to trigger Title VII coverage, or the time period in the statute of limitations within which to bring a claim under Title VII's provisions. In either of these situations, one employee too few, or one day too many, could lead to a seemingly unfair result. *See, e.g., Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), where Justice Stevens, writing for the Court, gave a literal reading to the word "filed" with respect to the filing

(continued...)

II. THERE ARE COMPELLING POLICY REASONS WHY SECTION 704(a) SHOULD NOT BE INTERPRETED TO ENCOMPASS FORMER EMPLOYEES.

While amicus submits that the term "employees" in Section 704(a) does not include former employees under normal rules of statutory construction, there are also several policy reasons why Petitioner's broad reading of that term should be rejected.

A. The Inclusion of Former Employees Under Section 704(a) Will Create Confusion Among Employers with Respect to Their Title VII Liability and Permit Double Recovery for Aggrieved Individuals.

Holding former employees applicable under Section 704(a) will cause great confusion among employers with respect to their Title VII liability. Since a prospective employer is already liable under Section 704(a) for retaliating against an applicant who has availed himself of Title VII protections, see 42 U.S.C. §2000e-3(a), it would be confusing for a former employer to be likewise liable

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[4](...continued)
requirements of Title VII. In doing so, this Court rejected a *pro se* discrimination complaint as untimely filed even though the lower court's equitable interpretation of "filed" would be more faithful to the "strong federal policy of insuring that employment discrimination is redressed." *Id.* at 813. *See also United States v. Perdue Farms, Inc.*, 680 F.2d 277, 285 (2d Cir. 1982) (literal reading of environmental statute must be followed and "inequitable" results or "alleged drafting error[s] are for Congress, not the courts, to resolve").

for the same individual. If former employees were also covered under Section 704(a), courts would have difficulty determining when and whether a former employer or a prospective employer is liable to the applicant.

For example, how will a court determine employer liability under Section 704(a) where an applicant who filed an EEOC claim has two former employers -- both of whom gave the applicant negative employment references -- and the prospective employer in bad faith relies on these two recommendations in refusing to offer the applicant a job? Extending Section 704(a) to include former employees could potentially provide a plaintiff with double remedies.[5]

Conversely, under the court of appeals decision below, only the prospective employer would be liable to the plaintiff. Adhering to the plain language of the statute, in which Section 704(a) specifically protects "applicants for employment," the court below maintains the working balance between employers and employees in the employment relationship. Holding that Section 704(a) includes former employees, however, will result in confusion among courts and employers with respect to their Title VII liability.[6]

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[5] Petitioner's amici readily admits the likelihood of double recovery if former employees are covered under Section 704(a). *See* Brief of The Lawyers' Committee for Civil Rights Under Law, et al., at 13-14 (Fourth Circuit's reading of Section 704(a) "would immunize company 'X' for providing a retaliatory bad reference but penalize company 'Y' for acting on it, when both knew it to be false and retaliatory!").

[6] For example, assume that a company has 15 employees
(continued...)

B. Petitioner's Claim Is More Appropriately Litigated under State Tort or Contract Law.

Petitioner's retaliation claim is more appropriately litigated as a defamation or contract claim under State law rather than as a federal claim under Title VII. "Title VII is not a 'bad acts' statute." *Holder v. City of Raleigh*, 867 F.2d 823, 828 (4th Cir. 1989).

In an analogous case, a federal district court held that a blacklisting of a former employee by a former employer was not discrimination under Title VII. *Ferguson v. Mobil Oil Corp.*, 443 F. Supp. 1334 (S.D.N.Y. 1978), *aff'd without opinion*, 607 F.2d 995 (2d Cir. 1979). The district court reasoned, "[A]lthough such behavior is obviously reprehensible and probably tortious, it is clearly not discriminatory. Rather, it would appear more closely analogized to state law claims of 'slander' and 'tortious

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[6](...continued)
and discharges one of them who later files a Title VII discriminatory discharge complaint. The company now has only 14 employees and soon thereafter ceases to be a covered "employer" as that term is defined in 42 U.S.C. 2000e(b) because it has less than 15 employees. If, as in this case, that employer subsequently provides a poor performance rating for the discharged employee to a future employer, does that mean that the employer remains liable under Title VII for acts committed *after* it ceased to be a statutorily defined employer with respect to the former employee? Petitioner's argument would thus lead to confusing and bizarre situations where a company is both covered and not covered by Title VII at the same time.

interference' with an employment relationship." *Id.* at 1339.

Even though Title VII's Section 704(a) was enacted after the *Ferguson* decision, the *Ferguson* rationale is still valid. Robinson could have sued Shell Oil Co. for defamation or for tortious interference with a prospective employment relationship.[7] Unlike Title VII claims, Robinson's tort claims would not be limited to traditional equitable relief. *See* 42 U.S.C. § 2000e-5(g); *Albermale Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). *But see* 42 U.S.C. § 1981a (allowing for punitive damages). Furthermore, under state tort law, the statute of limitations provide an aggrieved person is much longer period than the usual 180-day limitation available to plaintiffs to file Title VII claims. *See* 42 U.S.C. § 2000e-5(e). This is a tort claim wrongly litigated as a Title VII claim.

Petitioner's claim that a refusal to include former employees under Section 704(a) would deter employees from filing EEOC complaints is grossly exaggerated. Had tort or contract law remedies been unavailable to aggrieved

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[7] State law jurisprudence generally recognizes the importance to society that future employers should be able to solicit and receive candid performance evaluations of applicants from their former employees. Accordingly, in Texas, where the respondent is located, and in Maryland, where the petitioner resides, employers generally enjoy a qualified privilege for such statements. *See, e.g., Holley v. Smith*, 827 S.W. 2d 433 (Tex. Ct. App. 1992); *Marchesi v. Franchino*, 243 A.2d 533 (Md. 1978). The qualified privilege is lost, however, if the former employee can show malice on the part of the former employer. Thus, if the employer was motivated by racial or other discriminatory animus in providing false poor performance evaluations, that would certainly constitute the requisite malice.

former employees, petitioner's claim may have some merit. However, since Petitioner does have the option to sue for defamation, breach of contract, or tortious interference, the Court's refusal to extend Section 704(a) to former employees would not result in wholesale retaliatory behavior immune from judicial review.[8] On the other hand, if the Court holds that former employees are included under Section 704(a) protection, former employees will be able to manipulate employers into supplying positive recommendations when in fact good references are unwarranted. Such undeserved recommendations harm the new employer and the economy as a whole by allowing sub-standard work performance to continue in the marketplace.

C. The Courts Will Have Difficulty Determining Liability and Fashioning Equitable Remedies Under Section 704(a) For Former Employees.

In retaliation claims brought by former employees, amicus submits that it would be speculative to conclude that but for a former employee's negative recommendation the applicant/former employee would have been hired by the prospective employer. In addition, equitable remedies are ill-suited for this conduct.

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[8] In addition to remedies under tort and contract law, petitioner may also have remedies under a State's anti-discrimination law. *See, e.g.*, Tex. Lab. Code § 21.005 (Vernon Supp. 1996) ("An employer. . . commits an unlawful employment practice if the employer . . . retaliates or discriminates against a *person* who. . . files a complaint. . . or testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.") (emphasis added).

Several factors are often considered by an employer when making a hiring decision -- education, experience, interpersonal skills, analytical ability -- to name a few. An employer's reference is only one of many factors considered when hiring an applicant. If Section 704(a) were to apply to former employees, a former employee would be required to demonstrate that but for the poor reference, she would have received one of the jobs she was seeking. *Polsby*, 970 F.2d at 1366; *Sherman v. Burke Contracting, Inc.* 891 F.2d 1527, 1538 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990). Employment from prospective employers, however, is often no more than a good possibility, but by no means a certainty.

While relief must be in the form of making the former employee whole, the equitable means provided under Title VII to accomplish this goal are lacking. *Polsby*, 970 F.2d at 1366. Thus, because an employer considers many factors in its hiring process, and an employment reference is only one of those factors considered, it would be speculative for the courts to provide equitable remediation to the prospective employee under Section 704(a). As the *Polsby* court accurately noted:

> [I]t is much more difficult to fashion equitable relief for a former employee who was the victim of post-employment retaliation. While relief must be in the form of making the former employee whole as if the retaliatory act had not occurred, the equitable means to accomplish this goal are lacking. Such relief would entail calculating future damages and is far too speculative.

970 F.2d at 1366 (footnote omitted).

Accordingly, as a policy matter, retaliation claims by former employees are best adjudicated under state law, or under Title VII, but only against the prospective employer.

D. Extending Section 704(a) to Cover Former Employees Will Undermine the Integrity of a Good Employment Recommendation.

Many employees during the course of their employment career will participate in a Title VII proceeding in one form or another, either as a complainant or witness. To make employers liable for injuries to all former employees under Section 704(a) will cause employers to act in an unduly defensive manner when confronted by prospective employers seeking employment references from their applicants. With former employees covered under Section 704(a), employers will resort to giving a positive recommendation to former employees who have participated in a Title VII proceeding even when a negative reference is warranted. The result will be more positive recommendations provided by the employer to all former employees than would otherwise be warranted by their actual job performances.

This result does not promote the original purpose of Title VII. Rather, it creates a tilted employment market where the hard-working employees are indistinguishable from the less productive ones. Title VII was enacted to abolish racial, gender, color, creed, and national origin discrimination of employees by employers. An employee's previous job performance, however, is a legitimate and clearly relevant factor for prospective employers to consider when hiring. By extending Section 704(a) to

include former employees, an employers' ability to consider applicants' previous job performance for its hiring purposes would be seriously frustrated. Employers attempting to protect themselves from Section 704(a) liability will provide positive recommendations to these individuals irrespective of their merits. Knowing this to be the case, future employers will discount good employment references to the detriment of those industrious employees who truly deserve them.

CONCLUSION

For the foregoing reasons and those stated in Respondent's Brief, the judgment below should be affirmed.

Respectfully submitted,

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